

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Inquiry Concerning the Deployment of)	
Advanced Telecommunications Capability)	GN Docket No. 07-45
to All Americans in a Reasonable and)	
Timely Fashion, and Possible Steps to)	
Accelerate Such Deployment Pursuant to)	
Section 706 of the Telecommunications Act)	
of 1996.)	

REPLY COMMENTS OF THE NEW JERSEY DIVISION OF RATE COUNSEL

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I. INTRODUCTION AND SUMMARY

In filings submitted in response to the Federal Communications Commission’s (“FCC” or “Commission”) Notice of Inquiry (“Fifth Deployment NoI”), released under section 706 of the Telecommunications Act of 1996 (“1996 Act”),¹ into whether advanced telecommunications is being deployed in a “reasonable and timely fashion” to all Americans,² commenters present opposing views on the role the FCC should take to achieve nationwide broadband deployment. In these reply comments, the New Jersey Division of Rate Counsel (“Rate Counsel”) demonstrates that the Commission should reject the pleas of some for a “hands-off” approach to broadband policy, and,

¹/ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (“1996 Act”). The 1996 Act amended the Communications Act of 1934. Hereinafter, the Communications Act of 1934, as amended by the 1996 Act, will be referred to as “the 1996 Act,” or “the Act,” and all citations to the 1996 Act will be to the 1996 Act as it is codified in the United States Code.

²/ *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket No. 07-45, *Notice of Inquiry*, Rel. April 16, 2007 (“Fifth Deployment NoI”), ¶1.

instead, should heed those comments that demonstrate that, absent judicious government intervention, the nation's digital divide will become further entrenched and the Commission's goal of reasonable, timely broadband deployment thwarted.

Summary of Rate Counsel's Reply Comments

Initial comments differ regarding the fundamental issue of the need for government intervention to achieve national broadband goals. Some contend that the broadband market is working efficiently, insist that a hands-off policy is the advisable course,³ and express concern about the "chilling effect" of regulation on investment.⁴ In sharp contrast, others recommend active government involvement to ensure that all consumers have broadband access.⁵ Rate Counsel urges the Commission to find, based on the industry's duopolistic pursuit of the highest-revenue, lowest-cost consumers, that absent affirmative government policy, consumers will pay high rates for yesterday's technology, deployed unevenly throughout the country.⁶

Ample evidence has been submitted in this proceeding that demonstrates gaps in the nation's broadband deployment.⁷ Because the private market rationally deploys capital where the anticipated

³/ See, e.g., NCTA, at 2-4, and 24 (recommending that the Commission "maintain a watchful but deregulatory approach"); AT&T, at 2, stating, "[c]ompetition among these providers is flourishing."

⁴/ AT&T, at 2.

⁵/ See, e.g., NASUCA; CU et al; and American Library Association ("ALA"); M2Z Networks, Inc. ("M2Z") (M2Z describes itself as "an applicant for a license to provide a free, nationwide broadband Internet access service, known as the National Broadband Radio Service ("NBR"). M2Z, at 1.

⁶/ See also, M2Z statement that Section 706 of the 1996 Act requires "not simply a passive review by the Commission...but positive action by the Commission." M2Z, at 3.

⁷/ See, e.g., Rate Counsel at 21-24, citing: United States Government Accountability Office, Broadband Deployment is Extensive Throughout the United States, But It Is Difficult to Assess the Extent of Deployment Gaps in Rural Areas, GAO-06-426 (May 2006); John Horrigan, Pew Internet & American Life Project, Home Broadband Adoption 2006, May 28, 2006 (available at www.pewinternet.org); Broadband Everywhere, A Picture Is Worth a Thousand Words: How the Bell Business Model Leaves Much of America Behind, April 4, 2006, available at www.broadbandeverywhere.org. See also, CU et al at 22-26, also cite Technology Adoption and Barriers by Metropolitan and Non-Metropolitan Areas: Results and Analysis from the ConnectKentucky Technology Assessment Study", ConnectKentucky, 2005; Results of Greenlinings "Low Income Twenty-first Century Technology Study" as filed with the California Public Utilities Commission, May 24 2006. "Latinos Online: Hispanics with lower levels of education and English proficiency remain largely disconnected from the Inter Internet", March 14, 2007.

returns are highest, this uneven deployment is not, *per se*, surprising. However, because market failures leave many consumers unserved, government intervention is essential. Therefore, Rate Counsel recommends that the Commission and state, in collaboration with local and state policy makers, design and adopt affirmative broadband measures to lead to ubiquitous, affordable advanced services, deployed on a reasonable and timely basis. Rate Counsel and others describe specific proposals in initial comments, which merit the Commission's consideration.

As these reply comments discuss below, many commenters identify market failures, similar to those described in Rate Counsel's initial comments, and similarly urge the Commission to intervene to ensure the timely, reasonable, and affordable deployment of broadband. Others identify additional market failures that impede broadband development such as incumbent local exchange carriers' ("ILEC") premature retirement of copper plant, ILECs' supracompetitive special access rates, and ILECs' control of wireless facilities. Rate Counsel urges the Commission to consider the specific recommendations described in initial comments filed in this proceeding, some of which are discussed later in these reply comments. ILECs and cable companies may seek, predictably, to protect their profits and the duopoly that bolsters that revenue stream. When government intervention increases total consumer welfare and yields a societal benefit with vast network externalities (not captured by private sector pricing), such intervention is appropriate. This is the situation with today's incomplete national broadband infrastructure. Furthermore, access to comprehensive information bolsters the development of well-considered policy, keeping regulators out of the dark. Rate Counsel recommends that the Commission, in its related docket concerning data gathering (WC Docket No. 07-38), expand upon its presently over-simplified analysis based on the zip code. As numerous commenters

demonstrate, reliance on zip codes is an insufficient way to measure broadband availability and subscribership.⁸

II. DEFINING “ADVANCED TELECOMMUNICATIONS CAPABILITY”

The definition of advanced services should evolve to correspond with technological advances and changing consumer demand, and, also, should accommodate the symmetrical flow of information.

The Commission seeks comment on how it should define “advanced telecommunications capability.” CU et al raises significant concerns about broadband speed, which merit the Commission’s attention,⁹ stating that the Commission “has largely abandoned its duty to focus on the upload aspect of advanced telecommunications services.”¹⁰ Rate Counsel shares CU et al’s concern that neglecting to address upload speeds will yield a future national network limited to asymmetrical connections and capabilities.¹¹

CU et al further recommends that the Commission “revise the definition of ‘advanced services’ from 200 kbps symmetrical to a more realistic definition” and that “[a]t the very minimum this definition should initially be set at 3 Mbps symmetrical, which reflects the bandwidth needed for standard TV quality transmission.”¹² In initial comments, NASUCA recommended that the Commission establish a speed “of well over one megabyte per second.”¹³ The Computer & Communications Industry Association (“CCIA”) recommends that broadband connectivity¹⁴ be

^{8/} See e.g., Connected Nation, at 3-5; Time Warner Telecom, Inc., at 7-8.

^{9/} CU et al, at 9-17.

^{10/} *Id.*, at 11.

^{11/} *Id.*, at 16.

^{12/} *Id.*, at 17. CU et al also observes that 3 Mbps symmetrical supports standard TV quality, but that if HDTV were the chosen benchmark, the Commission should define advanced service as encompassing lines capable of between 12 and 40 Mbps symmetrical transmission. *Id.*

^{13/} NASUCA, at 9.

^{14/} CCIA suggests that telecommunications network facilities used for, or capable of, providing broadband services are facilities, not services, and should not be classified as deregulated information services. CCIA, at 2.

defined as, at a minimum, 2 mbps downstream and 1 mbps upstream.¹⁵ CCIA also recommends that the definition evolve and that the standards be based on speeds widely available in other industrialized nations and on “the best-served U.S. cities and suburbs.”¹⁶

By contrast, other commenters apparently do not see a need to revise “regulatory guideposts” for the definition of advanced services. AT&T states;

Accordingly, the Commission should be careful not to abandon regulatory guideposts that have provided a stable foundation for broadband deployment and penetration. One such guidepost is the Commission’s use of 200 kilobits per second (Kbps) as the threshold for “high speed” service (over 200 Kbps in at least one direction) and “advanced” service (over 200 Kbps in both directions). While some consumers have a desire for higher speed broadband, in general, consumer tastes for broadband have not shifted so completely toward the higher range of available transmission speeds to warrant abandoning the existing 200 Kbps threshold. In fact, a significant number of Internet customers in the U.S. still gain access via dial-up connections today. The Commission should keep in mind these consumer-driven marketplace realities as it evaluates the terms “high speed” and “advanced” services going forward.¹⁷

AT&T’s interpretation of “consumer tastes for broadband” should be filtered through the context of an evolving market, with changing prices and technology. The prices and availability of broadband services affect consumers’ demand: therefore, relying on last year’s demand data to set the benchmarks for tomorrow’s technology would dis-serve the nation. In summary, Rate Counsel recommends that the Commission, in this proceeding, modify the definition of advanced services to correspond with evolving technology, applications, and consumer demand, and, in future years, revisit the need to further modify the definition.

Initial comments emphasize the need for improved data gathering.

Rate Counsel concurs with Verizon and others that the FCC should collect data about availability and demand for different speeds and, similarly, with CU et al’s comment that the

¹⁵/ *Id.*, at 2.

¹⁶/ *Id.*, at 2.

¹⁷/ AT&T, at 3.

Commission fails to “gather the appropriate data that would enable it to assess if services that are capable of originating high-quality voice, data, graphics, and video are being deployed to all Americans in a reasonable and timely fashion.”¹⁸

Rate Counsel reiterates its recommendation that the Commission “explore options for obtaining detailed information in electronic format, compatible with a common geographic information system database from the industry about the geographic availability of broadband services.”¹⁹ Other commenters express concerns similar to those of Rate Counsel regarding the Commission’s and industry’s misplaced reliance on zip codes as a way to gauge success in achieving broadband deployment.²⁰ Rate Counsel also welcomes the opportunity to contribute to the Commission’s WC Docket No. 07-38.²¹ Rate Counsel also recognizes that Congress is considering legislation that entails improved broadband mapping and data collection, which may enhance federal and state policy makers’ ability to design and to implement policies.²²

¹⁸/ Verizon and Verizon Wireless (“Verizon”), at 32; CU et al, at 11-12; *see also*, Metropolitan Council of Governments, at 4.

¹⁹/ Rate Counsel, at 18. *See also*, NASUCA, at 7 recommending that “[t]he Commission should direct each ILEC and cable company to provide the Commission and state regulators with a geographic information system (“GIS”) database showing precisely where broadband access is available, to inform regulators’ and policy makers’ assessment of the status and future of broadband access.”

²⁰/ *See* Verizon, at 6, fn 15 (in which Verizon relies on zip code data as a way to describe deployment) and *see, e.g.*, CU at 18-21 (explaining why zip code data overstates broadband deployment progress); Connected Nation, Inc. at 3-5 (explaining that data collection overstates coverage).

²¹/ *In the Matter of Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscribership Data, and Development of Data on Interconnected Voice over Internet Protocol (VoIP) Subscribership*, FCC WC Docket No. 07-38, *Notice of Proposed Rulemaking*, Rel. April 16, 2007.

²²/ On May 17, 2007, the U.S. House of Representatives Subcommittee on Telecommunications and the Internet of the Committee on Energy and Commerce held a legislative hearing on broadband mapping and data collection. Also, on May 24, 2007, U.S. Senate Committee on Commerce, Science, and Transportation Chairman Daniel K. Inouye introduced the “Broadband Data Improvement Act,” “which seeks to improve the quality of federal broadband data collection and encourages state initiatives that promote broadband deployment.” U.S. Senate Committee on Commerce, Science, and Transportation Press Release, “Inouye Introduces Broadband Data Improvement Act,” May 24, 2007. Among other things, the legislation directs broadband providers to report broadband availability and connections within a 9-digit zip code (consistent with NJ Rate Counsel’s recommendation in its initial comments, at 17) and directs the Census Bureau to include a question in its American Community Survey that assess levels of residential broadband (versus dial-up) subscribership).

III. IS ADVANCED TELECOMMUNICATIONS CAPABILITY BEING DEPLOYED TO ALL AMERICANS? IS DEPLOYMENT REASONABLE AND TIMELY? ARE BROADBAND SERVICES AFFORDABLE?

Advanced telecommunications capability is not being deployed to all Americans.

The information provided in initial comments demonstrates that advanced telecommunications capability is not being deployed to all Americans.²³ Information submitted in initial comments shows that there are socioeconomic and geographic areas of broadband neglect that merit the Commission's attention.²⁴ The Commission's efforts to improve data collection and analysis will further assist the Commission in identifying and remedying broadband deployment gaps.

Despite some assertions to the contrary, broadband deployment is not yet sufficiently reasonable and timely.

Although various industry members compliment the Commission on its purportedly successful regulatory "hands-off" policy,²⁵ others describe major deficiencies in the nation's broadband progress. Contrary to some assertions,²⁶ broadband deployment in the U.S. is not currently reasonable, timely, or affordable.

Rate Counsel disagrees with AT&T's and others depiction of "robust" broadband competition, and the depiction of strong competition between cable and DSL.²⁷ As demonstrated in detail in the attachment to Rate Counsel's comments, the cable-telecommunications duopoly does not represent

²³/ See, e.g., Rate Counsel, at 21-25; CU et al, at 21-28.

²⁴/ *Id.*

²⁵/ See, e.g., Verizon, at 1, 5, 13, 34, 38; AT&T, at 2 (asserting that broadband competition "is flourishing and consumers are reaping the benefits.")

²⁶/ *Id.*, see also, Sprint Nextel Corporation, at 4-6.

²⁷/ AT&T, at 4-9. See also Verizon, at 1, 13, 15-21; Qwest, at 1 (stating that broadband competition is "robust and increasing"); NCTA, at 3 describing "fierce competition."

effective competition,²⁸ and, therefore, will not yield just and reasonable rates nor will it yield ubiquitous broadband deployment.

Rate Counsel also urges the Commission to heed the skepticism articulated by CU et al about incumbent carriers using 700 MHz licenses “to offer a wireless broadband service that cannibalizes their own market share in DSL” and thus the unlikelihood of 700 MHz providing a competitive “third pipe.”²⁹

The Commission should heed the concerns regarding prospects for competition aptly described by CCIA:

Even the largest Incumbent Local Exchange Carriers generally do not compete out of region with each other. They often speak of competition with the local cable TV operator, yet outside their regions, where they lack an entrenched market position, the ILEC’s are not investing to compete. Is investment in duplicative network facilities just too risky even for a nationwide ILEC in locations where they are starting from nothing? What does this say about the prospects for smaller, newer firms attempting to build out first connections or compete against existing providers?³⁰

IV. WHAT ACTIONS CAN ACCELERATE DEPLOYMENT?

Open access to incumbents’ wireline and wireless infrastructures, and the option to purchase unbundled products are essential.

In initial comments, Rate Counsel proposed several specific actions that the Commission could undertake to accelerate broadband deployment, which Rate Counsel continues to support.³¹ Among other things, as Rate Counsel discussed, the Commission should recognize the importance of ensuring that competitors have access to the unbundled elements of incumbent’s facilities.³² CU et al makes a

^{28/} Rate Counsel, Attachment A, Susan M. Baldwin, Sarah M. Bosley and Timothy E. Howington, “The Cable-Telco Duopoly’s Deployment of New Jersey’s Information Infrastructure: Establishing Accountability,” White Paper prepared for the Public Advocate of New Jersey Division of Rate Counsel, January 19, 2007.

^{29/} CU et al, at 34.

^{30/} CCIA, at 7.

^{31/} Rate Counsel, at 31-35.

^{32/} *Id.*, at 13-14 (discussing, among other things, a report by the European Commission which found that access to incumbent’s infrastructure is critical to accelerating broadband availability).

persuasive case for the benefit of conditioning the auctioning of spectrum blocks on open access rules, which would require the licensee to sell access to the network on a wholesale basis at commercial rates.³³ Rate Counsel also recommends that the Commission reject NCTA's argument that an à la carte requirement would lead to a net loss in consumer flexibility.³⁴ Bundled offerings, whether offered by cable companies or by telecommunications carriers, should be optional.

The Commission should encourage state and local involvement in achieving national broadband goals.

Contrary to Verizon's recommendation, the Commission should not "reiterate that state and local regulation of broadband is preempted."³⁵ Connected Nation demonstrates the success that can ensue from state leadership on broadband deployment.³⁶ The nation can ill afford to discourage state and local efforts to accelerate broadband deployment. Through their access to local- and state-developed detailed geographic information system databases, economic development activities, and regulatory experience, state and local government bring unique expertise to bear, which Rate Counsel urges the Commission to welcome.

Although Rate Counsel disagrees with the (Washington D.C.) Metropolitan Council of Government's statement that competitive forces should shape the continued deployment of broadband (because Rate Counsel does not agree that such competitive forces are yet sufficient), Rate Counsel concurs with the organization's recommendation that the Commission should encourage municipalities to step in when the private sector fails to deploy broadband services at an adequate level.³⁷

³³/ CU et al, at 35-36, 53; *See also* Rate Counsel at 13 (discussing importance of open access to incumbents' infrastructure).

³⁴/ NCTA, at 26.

³⁵/ Verizon, at 34.

³⁶/ *See generally* Connected Nation, discussing successful efforts to deploy broadband in Kentucky, and its specific recommendation at 6 that the Commission encourage public-private partnerships.

³⁷/ Metropolitan Council of Governments, at 5.

The Commission should prohibit ILECs' premature retirement of copper plant because such retirement thwarts the Commission's broadband goals.

Several comments identify an opportunity for accelerating broadband deployment and broadband competition that the Commission unfortunately is thwarting through regulatory inattention to the ILECs' premature retirement of the nation's copper infrastructure. Covad Communications Company ("Covad"), among others,³⁸ expresses concern regarding ILECs' retirement of copper plant, stating: "Anything which limits the competitive industry's access to copper infrastructure represents a step backwards in terms of ubiquitous availability of advanced service options."³⁹ The Commission should analyze carefully (and before the opportunity is lost entirely) how premature copper retirement affects the development of broadband competition, particularly in markets where few options, if any, are available.

Several CLECs filed a petition for rulemaking ("CLEC Copper Petition") with the Commission on January 18, 2007, regarding ILEC retirement of copper loops and copper subloops.⁴⁰ The CLECs assert that:

[t]he rules currently in place for retirement of copper loops and copper subloops do not adequately safeguard against discriminatory and anticompetitive modifications to incumbent LEC networks that effectively eliminate access to unbundled network elements ("UNEs") used by competitive LECs to provide broadband services to retail consumers and to business customers. The elimination of copper network facilities

³⁸/ See, also, comments of Computer & Communications Industry Association and Pacific LightNet, Inc. and Silver Star Telecom, LLC. Another comment states, "[a]s the result of significant advances in technology in recent years, copper facilities now, more than ever, are essential to deploying high speed and advanced services to all Americans, in a reasonable and timely fashion." NuVox Communications and XO Communications, LLC ("NuVox/XO"), at 3.

³⁹/ Covad, at 3.

⁴⁰/ In the Matter of Petition of XO Communications, LLC, Covad Communications Group, Inc., NuVox Communications and Eschelon Telecom, Inc. for a Rulemaking to Amend Certain Part 51 Rules Applicable to Incumbent LEC Retirement of Copper Loops and Copper Subloops, Petition for Rulemaking, filed January 18, 2007 ("CLEC Copper Petition"). See, also, a similar petition by BridgeCom International, Inc.; Broadview Networks, Inc.; Cavalier Telephone, LLC; Eureka Telecom Inc. d/b/a InfoHighway Communications; Florida Digital Network, Inc. d/b/a FDN Communications; IDT Corporation; Integra Telecom, Inc.; DeltaCom, Inc.; McLeodUSA Telecommunications Services, Inc.; Mpower Communications Corp.; Norlight Telecommunications, Inc.; Pacific Lightnet, Inc.; RCN Telecom Services, Inc.; RNK, Inc.; Talk America Holdings, Inc.; TDS Metrocom, LLC; and U.S. Telepacific Corp. d/b/a Telepacific Telecommunications, Petition for Rulemaking and Clarification, filed January 18, 2007.

inhibits network competition and the deployment of competitive and innovative broadband services to millions of consumers over alternative networks. This practice runs counter to the letter and spirit of the Telecommunications Act of 1996.⁴¹

The CLECs further asserted in their Petition that the ILECs are “gaming” the current rules⁴² and that narrowband transmission, provided by the ILECs over fiber facilities to CLECs, does not allow for the same types and range of services the CLECs can offer over existing copper loops.⁴³ The CLEC Copper Petition proposes changes to the FCC’s current rules to address these issues, including a formal process for review and approval by the FCC of any proposed retirement of copper loops and subloops, “including a critical presumption that such retirement does *not* service the public interest.”⁴⁴

Copper retirement may be both anti-competitive and anti-consumer. As noted by the petitioners, the copper facilities in question were “subsidized by monopoly regulation.”⁴⁵ The CLEC petition states: “Incumbent LECs cannot be permitted to exercise their control over legacy copper loop facilities unilaterally, in a fashion intended to undermine competition.”⁴⁶ Similarly, in the instant proceeding, the Computer & Communications Industry Association argues that the copper loops have been financed by monopoly ratepayers and that this “valuable infrastructure should not be hastily

⁴¹/ *Id.*, at 1.

⁴²/ *Id.*, at 4.

⁴³/ *Id.*, at 5, 10.

⁴⁴/ *Id.*, at 6.

⁴⁵/ *Id.*, at 4. The CLECs also raise the public interest argument stating that redundancy in networks is critical from a public safety standpoint and assert that copper loops are not subject to failure during power outages the same way fiber loops are. *Id.*, at 15-17. By way of illustration, Verizon’s financial reports indicate that it is retiring copper plant at a higher rate than in the past. Specifically, effective January 1, 2005, Verizon shortened the depreciation life on outside plant: copper cable, from 15-19 years to 13-18 years. Verizon also shortened the asset lives of other plant categories, including digital switches and circuit equipment. This change, according to Verizon, was “based on Verizon’s plans, and progress to date on those plans, to deploy fiber optic cable to homes, replacing copper cable.” Verizon New Jersey, Inc. Consolidated Financial Statements as of December 31, 2005 and 2004 and for the years then ended. Of course, shortening depreciation lives means that the cost of accelerated depreciation potentially could be passed on the consumers. At a minimum, the increased rate of depreciation serves to raise Verizon NJ’s expenses on paper and lower estimates of rate of return.

⁴⁶/ *Id.*, at 12.

dismantled with a chance for public input into the continue value of these wires for next generation DSL, and network redundancy for public safety in the event of power outages, for example.”⁴⁷

The FCC adopted the current rules regarding copper retirement in 2003 in its Triennial Review Order.⁴⁸ In considering the issue of incumbent Fiber-to-the-Home (“FTTH”) overbuild deployment whereby the incumbent constructs fiber parallel to, or in replacement of, existing copper plant, a situation the FCC then described as “largely theoretical,” the FCC concluded:

The record indicates that deployment of overbuild FTTH loops could act as an additional obstacle to competitive LECs seeking to provide certain services to the mass market. By its nature, an overbuild FTTH deployment enables an incumbent LEC to replace and ultimately deny access to the already-existing copper loops that competitive LECs were using to serve mass market customers. In this regard, incumbent LECs potentially have an entry barrier within their sole control (*i.e.*, the decision to replace pre-existing copper loops with FTTH).⁴⁹

However, the FCC declined to prohibit the retirement of copper loops or subloops when they are replaced with FTTH, but instead determined that its existing network modification notice rules provided adequate safeguards. Competitors have the right to file objections to the ILEC’s notice of retirement, but those oppositions are denied unless the Commission takes specific action within 90 days of the notice of retirement.⁵⁰

Rate Counsel urges the Commission to reconsider this finding, on an expedited basis. In this proceeding, the Commission is seeking methods by which it can accelerate broadband deployment. To take action in one proceeding that limits broadband providers’ ability to compete in the market and then in this proceeding to seek ways to expand competition is shortsighted, and ultimately harms

⁴⁷/ Computer & Communications Industry Association, at 9.

⁴⁸/ *Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98; *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Rel. August 21, 2003. See, *e.g.*, paras. 281-284 where the FCC modifies its notification of network modification rules. 47 U.S.C. § 251(c)(5); 47 C.F.R. §§ 51.325-.335.

⁴⁹/ *Id.*, at para. 277.

⁵⁰/ *Id.*, at paras. 282-283.

consumers, by denying them the benefits that the consumer-funded copper network could provide. The Commission should review its current rules that enable the ILECs to limit competitor access to underlying facilities through copper retirement notices and forbearance petitions that often receive no formal review.

The resolution of this issue bears directly on the prospects for competitors in the broadband market, and ultimately, on consumers' broadband options.⁵¹ The ILECs' unilateral actions regarding copper retirement is evidence that they continue to dominate local markets, control market entry, and affect the degree to which suppliers of like or substitute services can exist profitably. As suggested by Covad, "[t]he alternative to maintaining access to the copper network for competitive carriers is essentially mandating a mass migration of consumers from copper to ILEC fiber or cable"⁵² which would further entrench the emerging digital duopoly.

Rate Counsel concurs with conclusion of Pacific LightNet, Inc. and Silver Star Telecom, LLC that "[u]biquitous broadband deployment requires affordable, competitively-neutral access to last-mile broadband facilities."⁵³ Pacific LightNet, Inc. and Silver Star Telecom, LLC make a convincing argument that where customers do not have access to fiber, "the existing copper-based infrastructure still plays a primary role in the delivery of advanced and affordable telecommunications – both as the only game in town and, where fiber may be available, as technically and economically feasible alternative to fiber."⁵⁴

⁵¹/ FCC Public Notice, "Pleading Cycle Established for Comments on Petitions for Rulemaking and Clarification Regarding the Commission's Rules Applicable to Retirement of Copper Loops and Copper Subloops," RM-11358, DA 07-209, January 30, 2007. Comments were due March 1, 2007 and reply comments were due April 2, 2007.

⁵²/ Covad, at 6.

⁵³/ Pacific LightNet, Inc. and Silver Star Telecom, LLC, at 4.

⁵⁴/ *Id.*, at 2-3, note omitted.

Rate Counsel urges the Commission to prevent ILECs from squandering the nation's copper infrastructure, a national asset funded over the years by consumers. As was aptly observed in comments:

Consequently, retirements of copper facilities by the incumbent LECs takes place with increasing frequency and with no public interest analysis whatsoever. This alarming phenomenon results in the wasting of America's most ubiquitous and economical platform for delivering high speed and advanced services to small-to-mid-sized businesses and residential consumers.⁵⁵

The Commission's re-alignment of ILECs' supracompetitive special access service rates with the underlying costs of providing special access is long overdue, and, furthermore, would enhance broadband deployment.

Rate Counsel recommends that the Commission address Sprint Nextel's concern about the dampening effect of high special access rates on broadband deployment goals. As explained by Sprint Nextel, wireless carriers rely on ILECs' special access services to connect their cell towers to their switches and to ILECs' networks. Rate Counsel concurs with Sprint Nextel that Commission examination of ILECs' special access rates and profits⁵⁶ is long overdue.⁵⁷ Accurate pricing signals for ILECs' non-competitive special access circuits is essential to permit the economically efficient development of a multi-modal ubiquitous advanced telecommunications network. Artificially high special access rates are jeopardizing the Commission's ability to achieve its broadband deployment goals.

⁵⁵/ NuVox/XO, at 8.

⁵⁶/ See initial and reply comments of Rate Counsel, filed June 13, 2005 and July 29, 2005, respectively, submitted *In the Matter of Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, FCC WC Docket No. 05-25; RM-10593, *Order and Notice of Proposed Rulemaking*, Released January 31, 2005.

⁵⁷/ Sprint Nextel, at 6-15.

The Commission should address high-cost universal service issues in its high cost proceeding.

CTIA – The Wireless Association® (“CTIA”), citing the Federal-State Joint Board on Universal Service’s recommendation that the Commission adopt an interim emergency cap on high-cost universal service support for competitive eligible telecommunications carriers,⁵⁸ cautions the Commission against capping universal service funds for competitors, and states that such capping would discourage wireless carriers’ deployment of services in rural areas.⁵⁹ Rate Counsel recommends that the Commission address these universal service issues in the universal service proceeding.

NCTA proposes that the Commission consider expanding Lifeline and Link Up programs to make broadband access available to low income households.⁶⁰ Rate Counsel supports the widespread availability of broadband to all consumers, regardless of income.⁶¹ However, subsidies for Lifeline and Link Up participants is not sufficient as a way to achieve widespread affordable broadband services for all consumers.

The Commission’s separate proceeding regarding improved data gathering may lead to significantly improved information, which can guide the Commission’s policy making, but should not become a reason for delay in pursuing affirmative broadband deployment policies.

As stated by several, the Commission requires better data and information to design appropriate policy. The Commission should gather detailed data on deployment, subscribership, and on the cost of various technologies.⁶² Furthermore, consumer surveys should guide broadband policy.⁶³ However,

⁵⁸/ *In the Matter of High-Cost Universal Service Support Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, CC Docket No. 96-45, *Federal-State Joint Board on Universal Service Recommended Decision*, rel. May 1, 2007.

⁵⁹/ CTIA – The Wireless Association, at 16-17.

⁶⁰/ NCTA, at 28.

⁶¹/ Connected Nation determined that in Kentucky affluent households were five times as likely as low income households to have broadband connection. Connected Nation, un-numbered page of attachment.

⁶²/ *See, e.g.*, Rate Counsel, at 25-26; CU et al, at 50.

⁶³/ ConnectedNation, at 10.

Rate Counsel urges the Commission to avoid allowing the separate data gathering proceeding to impede progress in designing and adopting affirmative broadband deployment policies.

The Commission should focus more on “lessons learned” from other countries rather than the methodology of international broadband deployment ranking.

Many commenters discussed the implications and shortcomings of international rankings.⁶⁴

Rate Counsel urges the Commission to move beyond the debate about the proper ranking of the United States among other countries regarding broadband deployment and demand. Instead, the Commission should learn from the programs and policies that other countries are pursuing, to determine which, if any, could be replicated in the United States. Ultimately, the purpose of broadband deployment is neither for the sake of policy makers nor the industry, but rather the consumer. By way of illustration, a new broadband plan for Ireland, announced earlier this month and entitled a “National Broadband Scheme,” focuses on the consumer and is intended to provide broadband services to the areas of Ireland that are currently unserved and “ensure that every reasonable request for broadband in these unserved areas is met,” Mr. Noel Dempsey, Ireland’s Minister for Communications, Marine & Natural Resources stated:

Today’s launch is great news for broadband hungry consumers in rural areas. This Government believes that everyone, irrespective of where they are, should have access to high quality, competitively priced broadband services. This tender will help to make that happen. The knowledge worker cannot be confined by geographic location and should be free to live and work outside of the cities and towns. Our future should require networks to follow the knowledge worker rather than the other way around.⁶⁵

⁶⁴/ See, e.g., NCTA, at 15-21; CU et al, at 37-46; AT&T, at 16-19.

⁶⁵/ “Dempsey Unveils New National Broadband Scheme, Tender will see every reasonable request for broadband met nationwide,” May 2, 2007.

<http://www.dcmnr.gov.ie/Press+Releases/Dempsey+Unveils+New+National+Broadband+Scheme.htm>, visited May 24, 2007.

The program recognizes that private markets alone will not yield nationwide broadband deployment. As described in a press release issued by the Department of Communications, Marine & Natural Resources:

The National Broadband Scheme is technology neutral but Service Providers must ensure that the option they choose complies with the speed, capacity and latency requirements. The winning Service Provider or Service Providers will be engaged for a period of 5 years and will be required to provide an operational service as soon as possible. A claw back clause will also be put in place to ensure any unanticipated profits from the service are shared between the exchequer and the Service Provider(s).

Given the neutrality of the scheme, it is expected that the winning Service Provider, or perhaps a consortium of Service Providers, will use a combination of several technologies to meet the scheme's requirements.⁶⁶

Rate Counsel encourages the Commission to monitor the successes and pitfalls of programs such as these to determine which aspects of other countries' broadband initiatives may be applicable to the United States.

The Commission should take steps to promote wireless broadband competition.

According to M2Z, the FCC can remove barriers to entry into the broadband marketplace and “dramatically accelerate deployment of affordable broadband service to all Americans” by granting M2Z's application to provide free National Broadband Radio Service.⁶⁷ (M2Z, which has a pending application for a license and authority to provide National Broadband Radio Service in the 2155-2175 MHz Band, proposes to provide free broadband Internet access with downlink speeds of at least 384 kbps and uplink speeds of at least 128 kbps, accessible to all consumers who have low-cost devices for receiving the service.⁶⁸) M2Z raises the concern that “so long as the wireless networks are being built and operated by the same companies that control the wireline broadband facilities, it is unlikely that

⁶⁶ / *Id.*

⁶⁷ / M2Z, at 3.

⁶⁸ / *Id.*, at 1, 13.

the full promise of these new technologies will be realized.”⁶⁹ Rate Counsel supports entry by new entrants into the wireless broadband network because such entry may enhance competition, broadband deployment to unserved areas, lower prices and innovation.

V. CONCLUSION

Rate Counsel encourages the Commission to refine its broadband policies to promote the deployment of a national broadband network with high-speed access provided to consumers in a timely manner at affordable rates. Rate Counsel also urges the Commission to eliminate barriers to entry into the broadband market, which, in turn, will encourage competition, innovation, and affordable rates. Furthermore, states have an expressed grant by Congress under Section 706 of the 1996 to promote broadband. Rate Counsel recommends that the Commission and states take all reasonable initiatives to accelerate broadband deployment.

Respectfully submitted,

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⁶⁹ / *Id.*, at 8. (See similar concerns raised by CU et al discussed above, regarding the importance of open access to wireless facilities.)